UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

LEWIS, J.,
individually and on behalf of all
others similarly situated,

Plaintiffs,

v. Case No. 3:15-cv-00082

EPIC SYSTEMS CORPORATION,

Defendant.

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS AND COMPEL INDIVIDUAL ARBITRATION

The issue presented by Defendant Epic Systems Corporation's Motion to Compel Arbitration is a straightforward one: must Plaintiff Jacob Lewis arbitrate his claims for back overtime wages under the Fair Labor Standards Act ("FLSA") and Wisconsin law? The answer is yes.

As Epic pointed out in its opening Memorandum, Lewis's claims are within the scope of the Arbitration Agreement to which he agreed, yet he has refused to arbitrate his claims. (Memo. at 7-8.) Lewis has not disputed either of these points. Instead, he attempts unsuccessfully to challenge the validity of the Arbitration Agreement and introduce irrelevant arguments about other employees.

First, Lewis contends that the agreement is procedurally and substantively unconscionable—in other words, that it is so extreme that "no decent, fair-minded person would view the result of its enforcement without being possessed of a profound sense of injustice." *Hankee v. Menard, Inc.*, 2002 WL 32357167 *4 (W.D. Wis. Apr. 15, 2002) (Crabb, J.). In fact, it is evident from the face of the document that the terms of the Arbitration Agreement are fair and reasonable and apply equally to employee and employer alike, and the circumstances of its distribution to and acceptance by Lewis are unremarkable. Lewis did not support his Response with any evidence that he even had questions about the Arbitration Agreement, much less that he was confused or misled in any respect when he accepted its terms.

Lewis also falls flat with his attempt to argue that the Arbitration Agreement is not supported by consideration. Under Wisconsin law, Lewis's continued employment after accepting the Arbitration Agreement is all the consideration needed to make the contract valid. *Runzheimer Int'l, Ltd. v. Friedlen*, 862 N.W.2d 879, 882 ¶ 5 (Wis. April 30, 2015). Wisconsin law also holds that a mutual promise to arbitrate is adequate consideration. *Tinder v. Pinkerton Security*, 305 F.3d 728, 734 (7th Cir. 2002). Since the Arbitration Agreement here contains such a promise, the consideration requirement is satisfied in this way, too.

Finally, Lewis asks the Court to follow the National Labor Relations Board's decision in *D.R. Horton*. The NLRB's rationale has been roundly rejected by the federal courts. This Court's prior decision in *Herrington* arose in a different posture that required a showing of "extraordinary circumstances" in order for *D.R. Horton* not to apply. That higher standard is not applicable here, and the Court need not extend the *Herrington* holding to this case.

Federal policy favors enforcing the agreement and "mov[ing] the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 22, 24-25 (1983); *Gore v. Alltel Communications, LLC*, 666 F.3d 1027 (7th Cir. 2012); *Mason Cos., v. DAZ Sys., Inc.*, No. 12-cv-547-SLC (W.D. Wis. July 15, 2013). In light of the express language in the parties' agreement to arbitrate, and pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.*, Epic respectfully requests that this Court dismiss Lewis's Complaint and compel arbitration on an individual basis or, in the alternative, stay these proceedings pending the outcome of arbitration.

ARGUMENT

I. Neither The Facts Nor The Law Support The Notion That The Arbitration Agreement Between Lewis And Epic Is Procedurally Or Substantively Unconscionable

The Wisconsin Court of Appeals described the underlying principle of unconscionability as "prevention of oppression or unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." *Coady v. Cross Country Bank*, 729 N.W.2d 732, 741 (Wis.2d 2007). As this Court has explained it, an arbitration agreement "is unconscionable when no decent, fair-minded person would view the result of its enforcement without being possessed of a profound sense of injustice." *Hankee*, 2002 WL 32357167 at *4 (ordering arbitration of employment dispute).

To decide if an agreement is unconscionable, courts will look at procedural and substantive factors. *Villalobos v. EZCorp., Inc.*, 2013 WL 3732875, *2 (W.D. Wis., July 15, 2013). Procedural factors include the parties' "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question," while substantive factors are those related to "the reasonableness of the contract terms to which the contracting parties agreed, considered in the light of the commercial background and commercial needs." *Id*. (internal citations omitted). A finding of unconscionability requires a showing in both categories. *Id*.

As explained below, each of the purported bases that Lewis argues should establish unconscionability fall well short of the applicable standard, and the Arbitration Agreement should be enforced.

A. Epic Implemented The Arbitration Agreement In A Procedurally Sound Manner Devised To Be Easy To Understand, And Lewis Has Not Offered Any Evidence That He Was Misled

With its Motion, Epic submitted an authenticated copy of the email and Arbitration Agreement sent to and agreed by Lewis. (Dkt. 22, Ex. A-C.) The transmittal email and Arbitration Agreement, both of which are written in plain terms and a regular sized font, was provided to Lewis before it went into effect. (*Id*., Ex. B.) One day after receiving the Arbitration Agreement, Lewis affirmatively responded, "I understand and agree." (*Id*., Ex. C.)

Lewis does not submit any evidence to suggest that he did not understand the agreement, and it is easy to understand why.[1] Despite his attempts to play down his education and aptitude, Lewis possesses a Bachelor of Arts degree from Samford University, where he majored in History and graduated with honors and a 3.41 grade point average. He was employed by Epic as a Technical Writer—a position that demands careful reading and attention to detail, and for which Lewis wrote in his self-evaluation he performed at a "high level" while working on "increasingly complex deliverables."

Lewis asserts that the agreement is unconscionable because Epic may not have answered questions that other employees had about the document. (Resp. at 17.) That theory was rejected in *Villalobos v. EZCorp., Inc.*, 2013 WL 3732875, *2 (W.D. Wis., July 15, 2013), which Lewis cites. (Resp. at 15.) In that case, a payday lender moved to enforce a "Waiver of Jury Trial and

[1] Two Epic Technical Writers, Karen Campbell and Rebecca Rodgers, submitted declarations that described their own backgrounds and their reactions to the Arbitration Agreement. (Dkt. 43, 45.) Neither Campbell nor Rodgers writes anything about Lewis, and Lewis did not submit a declaration or other evidence on his own behalf.

Arbitration Provision" in the loan document. The defendant's employees did not explain the provision to the plaintiff, nor did they inform her that she was waiving her rights to pursue the claims in court by signing the loan contract. Notwithstanding these facts, the court enforced the arbitration agreement, concluding that it was not unconscionable.

The assertion is also irrelevant to the question of whether *Lewis* must arbitrate his claims, because he simply accepted the Arbitration Agreement without raising any questions about the content or meaning of the document. Even now, he has failed to supply testimony or other evidence that he had any questions about the Arbitration Agreement, was misled or confused by any of the procedures followed by Epic to disseminate the Arbitration Agreement, or that he did not understand any aspect of the Arbitration Agreement. Whether others may have had questions, and how Epic planned to or did respond to those questions, has no bearing on the Arbitration Agreement between Epic and Lewis.[2] As noted in another case cited by Lewis, the party resisting arbitration bears the burden of establishing that the arbitration clause is unconscionable. *Felland v. Clifton*, 2013 WL 3778967, *7 (W.D. Wis. July 18, 2013), citing *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000). By failing to offer any evidence that *he* had questions, or that Epic failed to answer his questions or answered them in a misleading way, Lewis has not met his burden even to make this a point of dispute.

Lewis's other assertions of procedural unconscionability are also easily dismissed. For example, Lewis claims the Arbitration Agreement is an unconscionable "contract of adhesion" on account of Epic's "superior bargaining power," citing *Hankee*, 2002 WL 32357167. (Resp. 17-18.) The decision rejects that very argument. The plaintiff/employee in that case complained that there had been no "meeting of the minds" with the defendant/employer, since she had "no

[2] Again, Campbell and Rogers describe only their own reactions to the Arbitration Agreement. Neither say anything about Lewis. (Dkt. 43, 45.)

choice but to sign the agreement or face losing her employment," making it "void as an unconscionable contract or a contract of adhesion. *Id.* at *4. Citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991), the Court explained that "a naked claim of 'unequal bargaining power,' like the one plaintiff raises here, is not a reason to invalidate arbitration agreements in the employment context." *Id.* In addition, the plaintiff did have a choice: "she could have rejected the terms of the agreement and found employment elsewhere." *Id.*[3] As a result, the Court found that "the arbitration agreement is valid and enforceable." *Id.* at *1.[4] The same is true for Lewis, and any purported differences in bargaining power are not enough to upend the Arbitration Agreement.

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[3] Lewis points to an online article and claims that "[m]ost Epic employees are also subject to a non-compete agreement. . . which would further limit their ability to seek other employment. . . furthering the imbalance between the bargaining parties." (Resp. at 18 n.6.) Once again, however, Lewis does not offer any evidence that *he* is or was subject to a non-compete, or that any such agreement limited *his* ability to seek other employment, or even that he was concerned about such limitations. As the Wisconsin Supreme Court recently reiterated, an "at-will employee has just as much power to terminate the employment relationship as the employer does." *Runzheimer*, 362 Wis.2d at 122 ¶ 47.

[4] Lewis also cites *Wis. Auto Title Loans, Inc. v. Jones*, 290 Wis. 2d 514 (Wis. 2006), which is not an employment case. Rather, *Jones* concerns an automobile lender's attempt to force an indigent borrower "in need of cash" to arbitrate all claims while the lender remained free to enforce its rights in court. *Id.* at 522. The court found the arbitration clause unconscionable but did not offer any discussion that might alter the conclusion reached in *Hankee* or otherwise inform the analysis of an employer/employee relationship like that between Epic and Lewis.

In addition, Lewis cites *Coady*, which also is not an employment case and says nothing about the relative bargaining power of employers and employees. The plaintiffs in *Coady* were credit cardholders who accused the defendant of illegal debt collection. 299 Wis. 2d at 426. Defendants moved to compel arbitration based on a contract of adhesion—a credit card agreement that was not provided to plaintiffs at the time of sign up. *Id.* at 442-443. The court's finding of procedural unconscionability did not turn on differences in bargaining but on a whole host of factors, including: plaintiffs were low income, or nearly so; plaintiffs were not well educated (most, but not all, had a high school education); at least half the plaintiffs were unemployed; plaintiffs did not read or were not aware of the arbitration clause; the agreement was in small print; and plaintiffs were solicited by defendant. *Id.* at 441-442, 445. The court found facts weighing in support of substantive unconscionability too, including that the arbitration clause would deprive plaintiffs of certain rights under the Wisconsin Consumer Act. *Id.* at 448. On balance, the court concluded these facts rendered the arbitration clause unconscionable. Lewis does not even attempt to explain how these facts are analogous to his own, which is unsurprising since they clearly are not.

Next, Lewis suggests that the timing and content of the transmittal email may have been misleading with respect to another litigation matter, *Nordgren*, that was then pending against Epic. (Resp. 18-21.) Once again, Lewis's Response is devoid of any testimony or other evidence that *he* was misled in any respect that might warrant releasing him from arbitration of *his* claims.[5] As Magistrate Judge Crocker pointed out, without some evidence that the signer (Lewis) was misled, there is no reason to "go outside the four corners" of the Arbitration Agreement. (Dkt. 40 (Transcript of 6/5/2015 Hearing) at 3:20-4:8.)

This argument is also absurd in light of the facts. The email notice that Epic sent to Lewis explained the company's rationale in explicit terms, and it clearly put Lewis on notice that the Arbitration Agreement covers the very exempt status misclassification claim that Lewis advances in this lawsuit. The opening paragraph of the transmittal email states that: "The recent class action case filed against us, claiming that some of our salaried professionals should be reclassified as hourly employees, has convinced us that litigation is inefficient and wasteful, and highlights the advantages of arbitration." (Dkt. 22-2 at 2.) The leading paragraph of the agreement—titled *Mutual Arbitration Agreement Regarding Wages and Hours*—defines "covered claims" to include claims alleging "underpayment of wages" based on claims for eligibility for overtime." (Dkt. 22-2 at 3). The agreement states in plain language that "arbitration is the only litigation forum for resolving covered claims." *Id.* Further, far from

[5] Lewis notes that he sought discovery from Epic, including a request to depose the company's General Counsel, a request that the company produce its analysis of claims brought in prior litigation, and multiple other inquiries intended to probe the decision to initiate an arbitration agreement and communicate the agreement to employees. (Resp. at 18-20, n.7-9.) At a hearing on Lewis's motion to compel and Epic's motion for protective order, Magistrate Judge Crocker observed that "I can hypothesize why the plaintiffs would want this information. I'm not sure that it ever would be relevant. Maybe it would at some point in the case, but I'm not seeing the relevance to the arbitration issue. The [arbitration] clause says what it says" and "this background information to the Court just seems irrelevant." (Dkt. 40 (Transcript of 6/5/2015 Hearing) at 4:13-23.) The motion to compel was denied and the protective order granted. (Dkt. 38.) Lewis did not file a Rule 72 motion objecting to the Magistrate Judge's decision.

"shielding" the company from liability, the agreement commits Epic to proceed in the arbitral forum and be bound by the result. *Id*. And of course Lewis does not claim that *he* himself had put Epic on notice of his intent to pursue claims in court but was thereafter misled into agreeing to arbitration. Stated simply, nothing here suggests a false statement with intent to defraud or resulting damage.

One court recently rejected the same argument that Lewis has raised. In *Stevenson v. The Great Am. Dream, Inc.*, No. 12-cv-3359, 2014 WL 3519184 *1 (N.D. Ga. July 15, 2014), two individuals brought suit against their former employer under the FLSA and moved for conditional certification. While the motion was pending, a third employee signed an arbitration agreement. *Id*. The motion for conditional certification was later granted, and the third employee filed an opt-in form. *Id*. The defendant employer moved to compel arbitration of the third employee's claims. *Id*. The employee resisted, arguing that the agreement was unconscionable since it was executed during the pendency of a collective action that the defendant should have known might include her. The court rejected the argument, reasoning that "[r]egardless of whether there is a pre-existing collective action, the effect of the arbitration agreement is the same: it prevents the signatory from litigating her FLSA claim in a judicial forum." *Id*. The court also rejected the argument that the employer should have informed the employee of the pending litigation, since "[e]ven if [employee] was unaware of this litigation when she signed the arbitration agreement, she does not deny that the text of the arbitration agreement made it clear to her that she could not participate in an FLSA collective action suit, pre-existing or not." *Id*. at *3. *See also Stevenson v. Great American Dream, Inc*., 2014 WL 4925597 *1 n.10 (N.D. Ga. Sept. 30, 2014) (same).

Indeed, taking Lewis's argument to its logical conclusion shows that it cannot be the rule. Applying his reasoning, any employer who believes that an employee may file suit in court can never ask for or require the employee to participate in arbitration (no matter the merits of the potential suit), or can only do so after explaining the employee's potential court claims in explicit detail. Such a theory would create an exception that would make the FAA completely toothless, since it would effectively prevent employers from using arbitration agreements any time there is some possibility that one of its employees might have an existing claim that could be litigated in court. The FAA "establishes a liberal federal policy favoring arbitration agreements." *CompuCredit, Inc. v. Greenwood*, 132 U.S. 665, 669 (2012). Lewis's position is of course contrary to the goals of the FAA, which include "affording parties discretion in designing arbitration processes. . . to allow for efficient, streamlined procedures tailored to the type of dispute," and it would prevent employers and employees from reaping the benefits that the informality of arbitration provides, such as "reducing the cost and increasing the speed of dispute resolution." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1749 (2011).

Not surprisingly then, Plaintiff's theory is contradicted even by cases he cites. For example, in *In re Currency Conversion Fee Antitrust Litig.*, 361 F.Supp.2d 237 (S.D.N.Y. 2005) (Resp. at 21), credit card holders alleged a price fixing conspiracy by the issuing banks. After the litigation commenced, the banks modified the credit card agreements to include arbitration clauses. *Id*. at 243. "The notices did not inform the cardholders of the pendency of [the] litigation." *Id*. at 249. Nonetheless, all individuals who were not already participating in the litigation as putative class members at the time the credit card agreements were changed were subject to the arbitration clause. *Id*. at 258.

Lewis cites the inapposite *Johnson v. Rapid City Softball Ass'n*, 514 N.W.2d 693, 697 (S.D. 1994) for the proposition that "a release is not fairly made if the nature of the instrument was misrepresented." (Resp. at 21.) In that case, a softball player was led to believe that she was signing a team roster. *Id*. at 698. At the bottom of the roster, beneath the signatures of the team members, was a release that would shield the defendants from injuries that she might sustain during the game. *Id*. The court concluded that it was a factual question whether plaintiff knew she was signing a release of claims for any injuries. *Id*. Lewis, in contrast, does not argue that he was misled that he was signing an arbitration agreement—nor could he, when the email transmittal subject line, title of the document, and acknowledgment all bear the explicit label "MUTUAL ARBITRATION AGREEMENT REGARDING WAGES AND HOURS." (Dkt. 22, Ex. A-C.)

Similarly off base is Lewis's citation of *First Nat. Bank and Trust Co. of Racine v. Notte*, 97 Wis. 2d 207, 219 (Wis. 1980) for the proposition that "[n]on-disclosure can form the basis for a misrepresentation sufficient to allow the avoidance of a contract obligation." (Resp. at 21.) *Notte* concerned litigation between a bank and surety regarding a promissory note. *Id*. at 208-209. The court held that the creditor was not obligated to inform the surety of all matters affecting risk but there is a duty to disclose facts that materially increase the surety's risk beyond that which the creditor has reason to believe the surety intends to assume and which the creditor has reason to believe the surety does not know. *Id*. The holding does not concern arbitration agreements and has no evident application to the instant case.

The unconscionability doctrine, with its purpose to prevent "oppression or unfair surprise," *Coady*, 729 N.W.2d at 741, simply has no applicability to this case, where an educated employee received a plainly written agreement, affirmatively acknowledged receipt and understanding the following day, and continued to assent to the agreement through his continued employment. Accordingly, the Arbitration Agreement should be enforced and the motion to compel arbitration should be granted.

B. The Agreement Obligates Both Epic And Lewis To Arbitrate A Narrowly Defined Category Of Claims

Lewis makes the misguided argument that the Arbitration Agreement is substantively unconscionable based on his misunderstanding that it is one-sided and "is limited to claims. . . that employees, not Epic, would bring." (Resp. at 22-23.) In Lewis's telling, the claims subject to arbitration would seem to include only "underpayment of wages, misclassification as overtime exempt, or off-the-clock uncompensated work." (Resp. at 23.)

Lewis's argument is refuted by the plain text of the agreement. In fact, the Arbitration Agreement is a mutual promise that obligates both Epic and employees to take covered claims to an arbitrator. (Dkt. 22-1 at 2 ("I understand and agree that arbitration is the only litigation forum for resolving covered claims and that *both Epic and I* are waiving the right to a trial before a judge or jury in federal or state court in favor of arbitration.").) Furthermore, the "covered claims" are much broader than Lewis suggests and do include the types of actions that Epic would bring. (Dkt. 22-1 at 2.) One clear example of a claim that would be brought by Epic, not an employee, is that for "failure to reimburse or repay loans or advances," (*id*.), such as where there is a dispute over relocation expenses owed by a former employee.

Similarly, any claims for "overpayment of wages, expenses, loans, reimbursements, bonuses, commissions, advances, or any element of compensation"—claims that clearly would be brought by Epic, not an employee—also must be resolved through arbitration. Lewis grudgingly acknowledges that Epic is required to arbitrate overpayment claims but counters that "Epic has never to date made such a claim against an employee." (Resp. at 23.) This is hardly surprising, since the Arbitration Agreement has been in effect for only a little over one year. (Dkt. 44-1 at 6, Interrogatory No. 12.) In fact, Epic also has not arbitrated any claims like Lewis's since the Arbitration Agreement went into effect. (*Id*. at 5, Interrogatory No. 11.) The point is that when or if these covered claims do arise, they must be resolved through arbitration.

Lewis also makes the bizarre argument that the Arbitration Agreement is substantively unconscionable because other types of claims (not for wages and hours) may still brought in court. In Lewis's characterization, this means "Epic's ability to sue in court remains essentially unbridled," since the company could sue to enforce a non-compete agreement. (Resp. at 23.) But his argument ignores the fact that employees are also allowed to bring non-wage and hour claims outside of arbitration, such as discrimination claims.

The wage and hour-focused Arbitration Agreement, which applies equally to both Lewis and Epic, is nothing at all like the agreements at issue in the cases he cites. In *Jones*, the defendant was in the business of providing loans with automobile titles as collateral, while the borrower was indigent and in need of cash. 290 Wis.2d at 522, ¶ 7. The arbitration agreement between the two parties claimed to require binding arbitration for "all disputes, controversies, or claims between the borrower and [lender] relating to the loan agreement." *Id*. at 524 ¶ 15. But it also provided an exception that would allow the borrower to avoid arbitration and commence a court action to recover any outstanding balance on the note or to repossess the vehicle, without notice, in the event of default. *Id*. at 526 ¶ 19. That exception was obviously "broad and one-sided," and the court declared it substantively unconscionable. *Id*. at 549 ¶ 66.[6] There is no

[6] The same holding was reached in *Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004) (applying Tennessee law) (Resp. at 24), which also concerned an auto lender that exempted itself from the obligation to arbitrate.

comparable exception in the Arbitration Agreement that would allow one party to avoid arbitrating covered claims.

Lewis's invocation of *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) is also inapposite. (Resp. at 23.) In that case, applying Louisiana law, an agreement was found unconscionable because it required customers to arbitrate every dispute but did not place the same obligation on the provider. *Id*. at 168-69. Of course, as explained above, the Arbitration Agreement at issue here obligates both parties to take covered claims to an arbitrator. Similarly inapplicable is *Ferguson v. Countrywide Credit Indus., Inc*., 298 F.3d 778 (9th Cir. 2002) (Resp. at 24), where an agreement was found unconscionable under California law because it required arbitration of claims the court deemed most likely to be brought by employees (e.g., discrimination claims, breach of contract, and torts) while excluding those deemed most likely to be brought by the employer (e.g., intellectual property violations, unfair competition, and disclosure of trade secrets). *Id*. at 784-85. Again, this stands in sharp contrast to the Arbitration Agreement at issue here, which applies to wage and hour claims that either employees or Epic may raise and does not apply to many other claims, including claims that are exclusively brought by employees, like discrimination claims.

In sum, Lewis's claim that the Arbitration Agreement is one-sided is patently false. As explained above, both parties must arbitrate covered claims. Among the covered claims are some brought more typically by employers and some brought more typically by employees. Claims that are not covered, which likewise include some that are some brought more typically by employers and some brought more typically by employees, may be raised by either party in court. Such an agreement is not substantively unconscionable.

Simply stated, this is not an unconscionable agreement, which "no decent, fair-minded person would view . . . without being possessed of a profound sense of injustice." *Hankee*, 2002 WL 32357167 *4. Accordingly, the Court should enforce the Arbitration Agreement and order Lewis to arbitrate his claims.

II. The Arbitration Agreement Between Lewis And Epic Is Supported By Consideration, Including Lewis's Continued Employment And The Exchange Of Mutual Promises To Arbitrate

Lewis's contention that the arbitration agreement lacks consideration is unavailing. As noted in the text of the Arbitration Agreement, continued employment constituted acceptance of its terms. The Wisconsin Supreme Court recently reiterated that ongoing employment is sufficient consideration to make an agreement enforceable. *Runzheimer*, 862 N.W.2d at 882 ¶ 5. Here, Lewis agreed to the Arbitration Agreement on April 3, 2014 and continued his employment with Epic until December 2014 (Dkt. 22 ¶ 8), making the agreement binding on him.

Lewis has not offered any legal rebuttal to this point, and there is none. Instead, he attempts to muddy the waters by questioning when precisely the agreement went into effect and whether it would apply to an employee who did not click "I understand and agree" after reading the document or who "pack[ed] her desk immediately upon receiving the contract." (Resp. at 4.) None of these questions are relevant to the issue raised in Epic's Motion and now before the Court: must *Lewis* arbitrate *his* claims? *Lewis* did not ask any questions; he gave his affirmative assent to the Arbitration Agreement by clicking "I understand and agree" the day after the agreement was sent. *Lewis* did not pack his desk immediately upon receiving the agreement; he continued his employment for another eight months thereafter. For these reasons, the answer to the question "must *Lewis* arbitrate *his* claims" is yes.

The Arbitration Agreement is supported by additional consideration in the form of a mutual exchange of promises. As the Seventh Circuit explained in *Tinder*, 305 F.3d at 734, in Wisconsin, a "promise for a promise, or the exchange of promises, is adequate consideration to support a bilateral contract." *Id*. at 734, citing *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 636 (7th Cir. 1999).[7] More particularly, "[a]n employer's promise to arbitrate in exchange for an employee's promise to do the same constitutes sufficient consideration to support the arbitration agreement." *Id*.

The Arbitration Agreement, by its terms, unquestionably conveys a mutual promise. Here, the first paragraph provides that "*Epic Systems Corporation . . . and I agree* to use binding arbitration, instead of going to court, for any 'covered claims' that arise or have arisen between me and Epic[.]" (Dkt. 22-1 at 2 (emphasis added).) Two paragraphs later, in bold, the promise is reiterated: "I understand and agree that arbitration is the only litigation forum for resolving covered claims and that *both Epic and I* are waiving the right to a trial before a judge or jury in federal or state court in favor of arbitration." (*Id*. (emphasis added).) Thus, the Arbitration Agreement is supported by the mutual promise to arbitrate.

Lewis argues that the arbitration agreement is illusory because Epic could modify its terms in some circumstances, but this rests on a misstatement of the facts. (Resp. at 25.) Contrary to Lewis's representation, Epic does not enjoy an "unfettered" right to make changes. Under the agreement, changes may only be made with 90 days' notice. (Dkt. 22-1 at 3.) Furthermore, any changes will not apply to a pending claim. (*Id*.) These limitations on Epic's

[7] Lewis cites the *Michalski* decision but fails to note that the court reached the exact opposite decision that Lewis has requested. In that case, the Seventh Circuit reversed the district court's decision not to compel arbitration, holding that the employer's "promise to be bound by the arbitration process itself serves as mutual consideration here." 177 F.3d at 636. The Arbitration Agreement between Lewis and Epic contains the same mutual promise and also should be enforced.

ability to make changes make the agreement binding and enforceable. As noted in one of the decisions that Lewis relies on, *Devine v. Notter*, 312 Wis.2d 521 (Wis. App. 2008), "[w]here. . . the right to cancel is limited even in slight ways, courts have found this enough of a detriment to the cancelling party to save the contract from illusoriness." *Id*. at 528.

These facts also set the instant case apart from other cases relied upon by Lewis.[8] For example, Lewis cites to *Druco Restaurants, Inc. v. Steak N Shake Enterprises, Inc.*, 765 F.3d 776 (7th Cir. 2014), a decision that applies Indiana law. In that case, a franchisor and franchisees became embroiled in a dispute over who had the authority to set prices and promotions. *Id*. at 778-79. The franchisor issued a non-binding arbitration policy *after* the franchisees had filed lawsuits to resolve the issues, then attempted to stay the litigation and compel arbitration. *Id*. at 779. As the court explained, the franchisor "was free to exercise or not exercise the arbitration clause at its whim," and it "also retained the discretion to determine the circumstances and procedures under which arbitration may take place, including which types of claims will be subject to arbitration." *Id*. at 783. That is a far cry from the Arbitration Agreement between Epic and Lewis, which specifies the precise claims subject to arbitration, requires both parties to resort to the arbitral forum to resolve such claims, imposes a 90-day notice period for modifications, and forbids any modifications to affect pending claims.[9]

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[8] Lewis cites the concurring opinion in *DeBruin v. St. Patrick Congregation*, 343 Wis.2d 83 (Wis. 2012), for the general proposition that an employer which does not actually intend to be bound by an agreement has furnished an illusory promise. (Resp. at 26.) However, the majority opinion dismissed the complaint on First Amendment grounds and did not analyze the employment agreement at all. *Id*. at *91-92.

[9] Lewis also cites a slew of decisions arising in other jurisdictions and applying other states' laws. Each turns on a factual circumstance that did allow one of the parties to modify the agreement without restriction, thus making them distinguishable from the instant case for the reasons already explained. *See, e.g.,Dumas v. American Golf Corp*., 299 F.3d 1216, 1219 (10th Cir. 2002) (New Mexico law) (finding agreement illusory because arbitration provisions were described in two documents that were not consistent with each other, one of which gave the employer the unfettered right to alter the arbitration agreement); *J.M. Davidson Inc. v. Webster*, 128 S.W. 3d 223 (Tex. 2003) (Texas law) (same); *Phox v. Atriums Management Co*., 230 F. Supp. 2d 1279 (D. Kan. 2002) (Kansas law) (same); *Carey v. 24 Hour*

Similarly distinguishable are the decisions in *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000) (applying Tennessee and Kentucky law) and *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F. Supp. 2d 985 (S.D. Ind. 2001). Nearly identical agreements were interpreted in both cases, and those agreements were structured in an unusual way that is not at all like the agreement before the Court in this case. Those seeking work at Ryan's Family Steak Houses ("Ryan's") were required as a condition of the application process to sign an arbitration agreement. *See, e.g., Floss*, 211 F.3d at 309. The agreement was not between the applicant and Ryan's, but between the applicant and an arbitration services provider, with Ryan's as third-party beneficiary. *Id.* In *Floss*, the court rejected the agreement primarily on the grounds that the arbitration provider retained the authority to make changes to the process without notice or consent, making the promise to provide an arbitral forum "fatally indefinite" and thus illusory. 211 F.3d at 315-16. And in *Geiger*, the court was swayed by the fact that Ryan's could cancel its contract with the arbitration services provider on short notice. 134 F. Supp. 2d at 1001. These factually unique cases do not inform the situation presented to the Court in this case.

In conclusion, the Arbitration Agreement is supported by ample consideration in the form of both continued employment and a mutual promise to arbitrate. Thus, the agreement is enforceable, and the Court should order Lewis to arbitrate his claims.

Fitness, 669 F.3d 202, 209 (5th Cir. 2012) (Texas law) (agreement illusory because employer had power to make changes that would have retroactive effect); *Morrison v. Amway Corp.*, 517 F.3d 248, 257 (5th Cir. 2008) (Texas law) (agreement illusory because amendments would be applicable to pending claims); *Keanini v. United Healthcare Services, Inc.*, 33 F. Supp. 3d 1191 (D. Hawaii 2014) (Hawaii law) (agreement illusory because the employer could amend the policy to avoid claims that had accrued); *Flemma v. Halliburton Energy Services, Inc.*, 303 P.3d 814 (N.M. 2013) (New Mexico law) (same); *Peleg v. Neiman Marcus Group, Inc.*, 204 Cal. App. 4th 1425, 1459 (2012) (Texas law) (agreement illusory because "it allows the employer to manipulate the arbitration process, tailoring it to fit specific cases").

III. The Great Weight Of Authority Counsels Against Deferring To The NLRB's *D.R. Horton* Line Of Cases

Lewis's final argument is that the arbitration agreement should be declared unenforceable in light of the decision by the National Labor Relations Board ("NLRB") in *In re D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), which concluded that class and collection waivers impede the ability of employees to engage in collective legal action. As Epic acknowledged in its opening Memorandum, the Court followed the NLRB's decision in *Herrington v. Waterstone Mortgage Corp.*, 993 F. Supp. 2d 940 (W.D. Wis. 2014). The Court later denied the defendant's motion to reopen the case and for reconsideration in light of the Fifth Circuit decision that overturned the Board's ruling, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

This Court need not consider itself bound by its prior deference to the NLRB's decision. As an initial matter, the *Herrington* decision was issued with the case in a different posture, with the defendant unable to satisfy Rule 60(b)(6)'s requirement to show "extraordinary circumstances" that would justify relief from a prior order by the Court. The posture of this case does not require Epic to satisfy that high standard.

The NLRB's position has not found support in the judiciary. In its opening Memorandum, Epic cited the federal appellate courts that have considered *D.R. Horton*, which unanimously have declined to follow the Board's rationale, as well as eleven federal district courts that have done the same. (Memo. at 11-12.) Other than *Herrington*, Epic has not identified any federal district court decisions that have adopted the rationale of *D.R. Horton*, and Lewis apparently has not found any either, since none are cited in his Response. Though the Seventh Circuit has not yet taken up the issue, the great weight of authority strongly suggests the NLRB's position would be rejected here too.

Accordingly, the Court should follow the reasoning of the decisions that have rejected *D.R. Horton*, enforce the Arbitration Agreement according to its terms, and order Lewis to submit his claim to arbitration on an individual basis.

CONCLUSION

WHEREFORE, for the reasons set forth in its motion, memorandum of law, and the foregoing reply, Defendant Epic Systems Corporation respectfully requests that this Court dismiss Lewis's Complaint and compel arbitration, or, in the alternative, stay these proceedings pending the outcome of arbitration.

Dated: July 31, 2015

Respectfully submitted,

EPIC SYSTEMS CORPORATION

By s/ Andrew Scroggins
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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on July 31, 2015, he caused a true and correct copy of the foregoing to be served upon the following counsel of record via the Court's electronic filing system:

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